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Recent Developments

Special Section

Recent Developments in Pennsylvania Land Use Planning

*Joseph Sabino Mistick**

INTRODUCTION

The Contract with America¹ has produced hundreds of new Republican office holders and has contributed to the shifting of control in Congress, state legislatures, governors' mansions, boards of county commissioners, and city halls. There is some disagreement over whether the contract is a persuasive leadership tool or a media gimmick. One thing is certain, however, the call for states' rights and a smaller federal government has hit a resonant chord.

Followed to its natural conclusion, this trend should extend to the municipal level where government is closest to the people. A review of the latest developments in Pennsylvania land use law indicates that the courts and legislature have gotten the message. Power is being restored to the local citizenry in a variety of ways, all of which demonstrate an appreciation for local self-determination and for the difficulties facing entry-level public servants. Specifically, local interest groups have been flexing their muscles by using their zoning codes and procedures as

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1. The Contract with America was reprinted in the MINNEAPOLIS-ST. PAUL STAR TRIBUNE, Oct. 30, 1994, at A20 [hereinafter Contract with America].

sculptors' tools to shape their communities both physically and socially. And the courts and legislature have been giving them the go-ahead.

This overview of recent developments begins, in Part I, with the sensationalized world of adult entertainment. Striptease entertainment seemed to be of little concern to local governments in the 1980's, and more importantly, it seemed that little could be done locally about this particular form of expression. This year, however, hardly a day passes without some new report of a battle royale over a strip club. What's more, a recent commonwealth court decision may encourage local regulators to square off with the First Amendment.²

Part II of this article addresses historic preservation. The United States Supreme Court has handed down a series of Takings Clause³ decisions indicating that individual ownership rights must be afforded greater consideration—and that may threaten the efforts of history buffs.⁴ The work of the agricultural preservationists may provide a framework for resolving this conflict. Under the recently amended Agricultural Area Security Law,⁵ thousands of acres of Pennsylvania farmland have been saved from developers. The success of this program may lie in its emphasis on local review.

Part III deals with the power of local zoning boards. The Sunshine Act subjects boards to the scrutiny of the people they serve and a recent common pleas court case reemphasized that the power is in the hands of the people—in their hand-held video cameras, that is.⁶ At the same time, a recent commonwealth court decision also recognized that the local citizens who serve on these boards are entitled to protection from tort liability, recognizing that if the lowest levels of government are going to assume more responsibilities, they must be given the same protections enjoyed by higher level government officials.⁷

2. See *Township of Concord v. Concord Ranch, Inc.*, 664 A.2d 640 (Pa. Commw. Ct. 1995).

3. The Takings Clause of the Fifth Amendment provides in relevant part: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

4. See *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Penn Central Transp. v. City of New York*, 438 U.S. 104 (1978).

5. PA. STAT. ANN. tit. 3, §§ 901-915 (1995).

6. See *Malczyk v. Slocum Township Zoning Hearing Bd.*, 85 Luz. Reg. Rep. 207 (C.P. Luz. Cty. 1995).

7. See *Delate v. Kolle*, 667 A.2d 1218 (Pa. Commw. Ct. 1995).

Part IV addresses local response to the growing cellular phone industry. It would have seemed that a recent commonwealth court decision would have eliminated much of the site-by-site battling over the construction of cell phone towers, but the locals have battled on. Much like the battles over group homes before the Federal Fair Housing Act,⁸ these towers are being considered one at a time, with the language of each local zoning code being determinative. Unless the public will exists to preempt local control in this area, municipalities will be able to stall the development of a comprehensive telecommunication network through the adoption of fairly primitive zoning amendments.

Finally, courts have indicated that the site specific relief afforded to developers that successfully challenge the constitutional validity of a municipal zoning code may not be automatic. The validity challenge mechanism may be subject to additional scrutiny, with zoning boards getting one more opportunity to frustrate the goals of a successful challenger. A recent commonwealth court decision encourages local officials to search through their zoning codes for a "silver bullet" provision that will stop the development in its tracks.

I. IT'S 11:00 P.M. . . . DO YOU KNOW WHERE YOUR HUSBAND IS?⁹
TOWNSHIP OF CONCORD V. CONCORD RANCH, INC.

Neighbors of Indiana County's End Zone Club, which features "flashing lights, thundering music and naked dancers," protested the club with signs and placards that read: "Keep your clothes on," "Satan tries again," and "Does your wife know you're here?"¹⁰ Club owner Larry Nagle retorted that the club offers "admiration of the human form in its purest sense."¹¹ Residents were especially angered, however, because the Northern Cambria County Community Development Corporation gave Nagle a special deal on the property under the impression that Nagle would open a "jobs-producing hardwoods plant" similar to one he already owns in Jefferson County.¹²

Controversies over nude dance clubs have littered the headlines during the past year in what is perhaps the most visible example of recently revived land use issues. In addition to the controversy in Indiana County, legal battles have ensued over

8. 42 U.S.C. §§ 3601-3631 (1988).

9. See Tom Gibb, *Rural Neighbors Rally Against Nude Dancing*, PITTSBURGH POST-GAZETTE, Nov. 5, 1995, at A16.

10. Gibb, *supra* note 9, at A16.

11. *Id.*

12. *Id.*

Rostraver's Club Erotica,¹³ as well as Fantasy's Gentleman's Club.¹⁴ But what have the courts said in response to communities' increasing intolerance of these adult uses?

Concord Ranch

In *Township of Concord v. Concord Ranch, Inc.*,¹⁵ Pennsylvania Commonwealth Court President Judge Collins offered a glimpse of what can be expected from the commonwealth court on these issues in an entertaining opinion that would have made former Justice Musmanno proud. Concord Ranch, Inc. ("CRI") operated the Longhorn Ranch, which was an entertainment center featuring male and female dance reviews.¹⁶ In August of 1994, CRI began using the facility for topless female dancing.¹⁷ The Township Zoning Officer advised CRI that the "ecdysial" entertainment featured at the Longhorn Ranch violated a zoning ordinance.¹⁸ The notice issued to CRI explained that it had the right to appeal to the Zoning Hearing Board within thirty days.¹⁹ CRI ignored the notice, continued the topless entertainment, and failed to appeal to the Board.²⁰

On October 5, 1994, the common pleas court entered an in-

13. The Concerned Citizens of Rostraver planned "protests and other efforts" to close down Club Erotica. *Anti-Club Tactics Planned: Club Erotica is Citizen Target*, PITTSBURGH POST-GAZETTE, Oct. 27, 1995, at D3. The Belle Vernon Ministerial Association also conducted demonstrations. Ernie Hoffman, *Officials Lose Bid to Close Club, Rostraver Residents Cite Violations of Zoning, Obscenity Laws*, PITTSBURGH POST-GAZETTE, Oct. 17, 1995, at B3.

14. Richard Marrone owned the building housing the nightclub. Jon Schmitz, *Building's Owner Sues Club*, PITTSBURGH POST-GAZETTE, Nov. 28, 1995, at C1. He sought an injunction against the operators of the club when they began staging nude dancing. *Id.* Marrone argued that the activity violated the lease and the zoning laws. *Id.*

15. 664 A.2d 640 (Pa. Commw. Ct. 1995).

16. *Concord Ranch*, 664 A.2d at 643. These reviews included the Chippendale Male Dance Review and "Las Vegas style" female dancers. *Id.*

17. *Id.* New management at CRI referred to the new use as a "gentlemen's club." *Id.*

18. *Id.* at 643-44. Judge Collins referred to "male and female topless entertainment and/or striptease entertainment" as "ecdysial entertainment." *Id.* at 643. Footnote 2 of the opinion explained:

Webster's Third New International Dictionary (Webster's) defines the word ecdysial to mean, "of, or relating to, or functioning in ecdysis." *Webster's Third New International Dictionary* 718 (1981). Ecdysis is defined as "the act of molting or shedding an outer cuticular layer." *Id.* Cuticular is defined as "of or relating to cuticle or cuticula." *Id.* at 561. A cuticle is commonly defined as "an outermost layer." *Id.* Consequently, Webster's defines the term ecdysiast as a "stripteaser." *Id.* at 718.

Id. at 644 n.2.

19. *Id.* at 644.

20. *Id.*

junction that prohibited topless dancing on the premises.²¹ The court concluded that CRI failed to comply with the enforcement notice, failed to appeal, and intentionally expanded its non-conforming use without permission.²² CRI filed a demand for final hearing under Pennsylvania Rule of Civil Procedure 1531(f)(1), stating that the injunction restrained freedom of expression.²³ The common pleas court found that freedom of expression was not involved, and instead, stated that nothing more than enforcement of the zoning ordinance was sought.²⁴

On appeal, the commonwealth court held that because CRI continued an unlawful use without appealing to the zoning board, Section 616.1(c)(6) mandated a conclusive finding of a violation, allowing the Township to seek an injunction under Section 617.2.²⁵

The court's use of the term "ecdysial entertainment" in place of the tired and shabby term "striptease," with which we are most familiar, lended a loftier image to the activity in question. It does not appear, however, that the court elevated this adult use above the Municipal Planning Code (the "MPC") or local land use regulation. We may never know whether the citation issued by the zoning officer involved a legitimate violation because CRI failed to appeal as required by the MPC, and the Township sought and received an injunction enforcing the cease and desist order in common pleas court.

The commonwealth court found that the inaction by CRI re-

21. *Concord Ranch*, 664 A.2d at 644.

22. *Id.* The court also found that a 1982 agreement between the Township and CRI was an *ultra vires* act because the board of supervisor's did not have the authority to enter into an agreement under the Municipal Planning Code. *Id.* The commonwealth court held this finding to be in error, however, because neither party challenged its validity. *Id.* at 646.

23. *Id.* at 644. Rule 1531(f)(1) states:

When a preliminary or special injunction involving freedom of expression is issued, either without notice or after notice and hearing, the court shall hold a final hearing within three (3) days after demand by the defendant. A final decree shall be filed in the office of the prothonotary within the three (3) day period, or if the final decree is not filed within twenty-four (24) hours after the close of the hearing, the injunction shall be deemed dissolved.

PA. R. CIV. P. 1531(f)(1).

24. *Concord Ranch*, 664 A.2d at 644.

25. *Id.* at 646. Section 616.1(c)(6) states that "failure to comply with the notice within the time specified, unless extended by appeal to the zoning hearing board, constitutes a violation, with the possible sanctions clearly described." PA. STAT. ANN. tit. 53, § 10616.1(c)(6) (1988). Section 617.2, providing for enforcement remedies, states in relevant part: "If the defendant neither pays nor timely appeals the judgment, the municipality may enforce the judgment pursuant to the applicable rules of civil procedure." PA. STAT. ANN. tit. 53, § 10617.2(a) (Supp. 1995). See also *Township of Maidencreek v. Stutzman*, 642 A.2d 600 (Pa. Commw. Ct. 1994).

sulted in a conclusive determination of a violation pursuant to MPC Section 616.1(c)(6).²⁶ CRI then invoked the muse, claiming that freedom of expression should not be frustrated by zoning statutes and ordinances.²⁷ To the surprise of CRI, the court rejected the claim that CRI was at least entitled to the safeguards of Pennsylvania Rule of Civil Procedure 1531(f)(1), which requires a special expedited formula to a final decree in matters involving freedom of expression.²⁸

CRI sat on its rights by not appealing the zoning violation citation, and, therefore, the court's message was clear that the land use procedures mandated by the MPC and local ordinances would not be trivialized, even by the First Amendment. Citing *Zimmerman v. Zoning Board of Adjustment*,²⁹ the court made clear that using the claim of freedom of expression, as CRI did in this case, is no more than an "end run" around the duly empowered legislative body.³⁰

Local regulators also received a boost to their ability to regulate adult uses in *1916 Delaware Tavern, Inc. v. Zoning Board of Adjustment*.³¹ There, the court found that local municipalities "are [not] precluded from exercising zoning controls over establishments thought by some to be potentially lewd and/or immoral" as long as the legislation is liquor neutral.³² This concept of liquor neutrality flowed from the fact that the city ordinance at issue in that case also dealt with non-licensed adult book stores and theaters. This provision expressly permitted cabarets in certain areas, with no regard for whether the establishments were licensed to serve liquor.

II. HISTORIC PRESERVATION AND FARMERS.

If you accept *Penn Central Transportation Co. v. New York City*³³ as, ideologically, the left-most outpost in the battle over non-consensual property takings in the last three decades, the slow but inexorable swing towards the right has not gone unnoticed.³⁴ At times in the years following *Penn Central*, it has

26. *Concord Ranch*, 664 A.2d at 646.

27. *Id.* at 646-49.

28. *Id.* at 647.

29. 654 A.2d 1054 (Pa. 1995).

30. *Concord Ranch*, 664 A.2d at 648.

31. 657 A.2d 63 (Pa. Commw. Ct. 1995).

32. *1916 Delaware Tavern*, 657 A.2d at 69.

33. 438 U.S. 104 (1978).

34. For the text of the Takings Clause of the Fifth Amendment, see *supra* note 3. Many authors have noted that the Supreme Court has been placing more emphasis on individual property rights. See, e.g., Chauncey L. Walker & Scott D.

seemed that historic preservation is of such vital importance to our nation that all other American notions of property rights must bow in its presence. Historic preservation still occupies a pedestal above the takings clause of the Fifth Amendment and it has equaled in importance governmental actions rooted in the physical safety of our citizenry. Observers of *Penn Central's* thirty-year run, however, have seen the Supreme Court move closer and closer to Justice Rehnquist's dissenting opinion, which argued that the historic landmark designation was a taking requiring compensation.³⁵

*First English Evangelical Lutheran Church v. County of Los Angeles*³⁶ ended a period of drought for the proponents of individual property rights by putting governments on notice that they could expect to pay for temporary takings caused by ill-conceived legislative initiatives.³⁷ In this case, a public safety goal was insufficient to spare the government from financial responsibility for the time it took the property owner to successfully challenge the law.³⁸

*Nollan v. California Coastal Commission*³⁹ reined-in regulators who took broad license with their statutory powers by attempting to control development aspects that were not the subject of the legislative authority under which they were operating.⁴⁰ With this case we acquired the nexus test, which now requires a connection between the thing that the government is attempting to regulate and the purpose of the legislation under which the individual would operate.⁴¹ The natural result must be greater care in drafting and enforcing land use regulations.

A review of *Keystone Bituminous Coal Ass'n v. DeBenedictis*⁴² is like "deja vu all over again."⁴³ Sixty-five years after *Pennsyl-*

Avitabile, *Regulatory Takings, Historic Preservation and Property Rights Since Penn Central: The Move Toward Greater Protection*, 6 FORDHAM ENVTL. L.J. 819 (1995).

35. The Court had held that New York City's landmark designations were a legitimate state interest that did not prevent a reasonable return on investment and was therefore not a taking. *Penn Central*, 438 U.S. at 135. The Rehnquist dissent, however, indicated that the landmark designations were a taking because they neither prohibited a nuisance nor offered a reciprocal benefit. *Id.* at 145-47 (Rehnquist, J., dissenting).

36. 482 U.S. 304 (1987).

37. *First English*, 482 U.S. at 320. The First English Evangelical Lutheran Church sought compensation for a "taking" when a temporary ordinance, designed to respond to a flooding emergency, prevented any construction or reconstruction of its destroyed buildings. *Id.* at 307.

38. *Id.* at 322.

39. 483 U.S. 825 (1987).

40. *Nollan*, 483 U.S. at 837.

41. *Id.*

42. 480 U.S. 470 (1987).

43. This phrase has been attributed to Yogi Berra. See JOHN BARTLETT, FA-

vania Coal Co. v. Mahon,⁴⁴ the United States Supreme Court considered another attempt to protect the owners of surface rights from the sub-surface activities of the industry.⁴⁵ Finding itself once again in the middle of two competing sets of property rights, the Court sided with the individual rights of the masses and set the stage for an as yet unscheduled rubber match.

With *Dolan v. City of Tigard*,⁴⁶ the Court came close to trumpeting the right of a private property owner to be free from frivolous regulatory interference by government officials. This case involved the owner of a hardware store who wanted to expand.⁴⁷ The City would allow this expansion only if the property owner allowed a bikeway to be constructed along the rear property line of the subject parcel.⁴⁸ So far this is a scenario familiar to zoning lawyers everywhere but there was a surprise ending. Applying the *Nollan* nexus test, the Court gave rise to the following question: Who goes shopping to the hardware store on a bicycle?⁴⁹ More importantly, it shifted the burden to prove a connection between the bikeway and the hardware store to the municipality.⁵⁰

All of this is really just background for a startling turn of events in Pennsylvania. In 1991, in *United Artists Theater Circuit, Inc. v. City of Philadelphia* ("United Artists I"),⁵¹ the Pennsylvania Supreme Court held that non-consensual takings for historic preservation purposes are takings that require the payment of just compensation under the Fifth Amendment.⁵² For one brief shining moment, Pennsylvania had broken from the pack and planted its flag in the land of individual property rights. This was a break with national precedent that did not last.

After much gnashing of teeth by preservationists and public officials with limited budgets, the Pennsylvania Supreme Court

MILLAR QUOTATIONS 754 (16th ed. 1992).

44. 260 U.S. 393 (1922).

45. *Keystone*, 480 U.S. at 474.

46. 114 S. Ct. 2309 (1994).

47. *Dolan*, 114 S. Ct. at 2313-14.

48. *Id.* at 2314.

49. *Id.* at 2321-22.

50. *Id.* (stating that the "city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway.").

51. 595 A.2d 6 (Pa. 1991).

52. *United Artists I*, 595 A.2d at 7 (stating "that by designating the theater building as historic, over the objections of the owner, the City of Philadelphia through its Historical Commission has taken the appellee's property for public use without just compensation in violation of Article I, Section 10 of the Pennsylvania Constitution.").

granted reargument and handed down *United Artists Theater Circuit, Inc. v. City of Philadelphia* ("United Artists II").⁵³ Just as suddenly as developers and property owners were freed from the bonds of preservation, they once again found their property subject to the fanciful intentions of strangers.⁵⁴ Pennsylvania found itself back in the pack.

United Artists I was, at the very least, a sign of the frustration that has been wrought from a situation in which individuals can nominate someone else's property for historic designation without a chance of the owner receiving compensation for any diminution in value caused by the designation. At best, this process has saved some glorious physical examples of our heritage. At worst, citizens' groups and preservation buffs have been encouraged to indulge in their hobbies at the expense of others. In search of a solution to this dilemma, we need to look no further than the treatment of our agricultural heritage in Pennsylvania.

The Agricultural Area Security Law⁵⁵ provides a process and funding for the purchase of agricultural conservation easements by the Commonwealth.⁵⁶ County boards entertain applications from owners of farm land who wish to sell perpetual easements that will assure that their land will not be available for any future development.⁵⁷ Those recommendations are then considered by a state-wide seventeen member Agricultural Land Preservation Board. Most of the funding comes from a two-cent tax on each pack of cigarettes.⁵⁸ The land can be leased or sold after the sale of the easement but the limitation to agricultural use remains in place. As a result of an amendment negotiated by State Representative William R. Lloyd, Jr. of Somerset County, the state board adopted guidelines in 1995 that will emphasize the soil quality during the farm selection process. This means that the "best" farms will be selected for preservation instead of those facing the greatest likelihood of conversion.⁵⁹

Piggybacking on a sin tax is an age-old strategy for funding those programs that do not have sufficient support to secure a

53. 635 A.2d 612 (Pa. 1993).

54. *United Artists II*, 635 A.2d at 620 (stating that "the designation of a privately owned building as historic without the consent of the owner is not a taking under the Constitution of this Commonwealth.").

55. PA. STAT. ANN. tit. 3, §§ 901-915.

56. Section 902 outlines the purpose of the Act. See PA. STAT. ANN. tit. 3, § 902.

57. The boards are enabled under § 904. See PA. STAT. ANN. tit. 3, § 904.

58. Christopher Elser, *Potential Changes in Farm Preservation May Hurt Local Efforts*, THE MORNING CALL (Allentown, Pa.), Sept. 2, 1995 (1st ed.), at B9.

59. Telephone interview with William R. Lloyd, Jr., State Representative (Feb. 7, 1995).

permanent place in state or local municipal budgets. A more logical source for funding historic designation, in light of claims that landmarks promote tourism, would be an additional levy on airport departures or room taxes. The same process of county nomination and state board selection would preserve local control without sacrificing the long view that can be provided by a board with less emotional attachment to individual projects. This procedure would not save every historic structure in the Commonwealth, no more than the farm preservation mechanism saves every worthy farm, but it would provide a sensible and affordable process on the heels of *United Artists I & II* and the expected progeny of *Dolan*.

With "private property rights" bills pending in Congress and the Pennsylvania House and Senate that would require compensation for historic designation takings, the usual way of establishing landmarks may be ending.⁶⁰ Typical "private property rights" provisions either exempt property owners from regulations that reduce their property values significantly or require the taking government to pay for what it has taken. If these proposals become law, the sun will set on non-consensual historic designations. If they do not become law, it remains clear that the mood of our nation and our courts is such that a more palatable approach may be the best hope for those who guard the relics of our past.

III. *MODO VINCIS, MODO VINCERIS*.⁶¹ SUNSHINE AND TORT LIABILITY

Zoning boards suffer from a sort of schizophrenia: on the one hand they are judicial in nature, enjoying a certain level of judicial immunity, and on the other hand, they are frequently treated as political bodies that must answer to the public, holding their quasi-judicial hearings and deliberations under a watchful public eye. This schism is apparent in two recent decisions: first, in a case before the Luzerne County Court of Common Pleas regarding the Sunshine Act; and second, in a ruling from the commonwealth court dealing with the liability of zoning board members for willful misconduct in the adjudication of a zoning case. This vignette analyzes the two cases and their reasoning,

60. See, e.g., Jonathan Rinde, "Take Me, Take Me"; *Can There Be a Private Property Rights Bill That Environmentalists Support?*, THE LEGAL INTELLIGENCER, Aug. 14, 1995, at 56.

61. "Well, you win some, you lose some." HENRY BEARD, LATIN FOR ALL OCCASIONS 18 (1990).

illustrating that, as of now, zoning boards must continue to accept their roles as neither fish nor fowl.

A. Lex, Eyes and Videotape—Malczyk v. Slocum Township Zoning Hearing Board

This Luzerne County decision will be welcome news to those persons who simply cannot get enough fast and furious zoning board action. In *Malczyk v. Slocum Township Zoning Hearing Board*,⁶² the plaintiff, Stanley Harmon, wanted to videotape his zoning board hearing.⁶³ The Slocum Township Hearing Board (the "Board") told Harmon that he was permitted to audiotape the hearing but that videotaping was not allowed.⁶⁴

Judge Stevens of the Luzerne County Court of Common Pleas considered Harmon's action in mandamus on the issue of whether the Sunshine Act (the "Act") permits videotaping of zoning board hearings.⁶⁵ The court held that a zoning board hearing is a public meeting for purposes of the Act⁶⁶ and further held that video cameras are a permitted "recording device."⁶⁷

The court was unpersuaded by the Board's argument that Rules 27 and 328 of the Pennsylvania Rules of Criminal Procedure prohibit videotaping proceedings because a zoning board is "judicial" in nature.⁶⁸ The court acknowledged that zoning

62. 85 Luz. Reg. Rep. 207 (C.P. Luz. Cty. 1995).

63. *Malczyk*, 85 Luz. Reg. Rep. at 208. Harmon wanted a special exception to open a firearms shop. *Id.*

64. *Id.*

65. *Id.* at 208-09. See The Sunshine Act, PA. STAT. ANN. tit. 65, §§ 271-286 (Supp. 1995).

66. *Malczyk*, 85 Luz. Reg. Rep. at 209. Accord *Harman v. Wetzel*, 766 F. Supp. 271, 275 (E.D. Pa. 1991); *Appeal of Emmanuel Baptist Church*, 364 A.2d 536, 539 (Pa. Commw. Ct. 1976). Section 274 of the Act requires: "Official action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public unless closed under Section 7, 8 or 12." PA. STAT. ANN. tit. 65, § 274 (Supp. 1995).

67. *Malczyk*, 85 Luz. Reg. Rep. at 211. Section 281(a) of the Act provides:

§ 281. Use of equipment during meetings

(a) Recording devices.—Except as provided in subsection (b), a person attending a meeting of an agency shall have the right to use recording devices to record all the proceedings. Nothing in this section shall prohibit the agency from adopting and enforcing reasonable rules for their use under section 10.

PA. STAT. ANN. tit. 65, § 281.

The court cited *Hain v. Board of Sch. Directors*, 641 A.2d 661, 664 (Pa. Commw. Ct. 1994), for the proposition that video cameras are recording devices under the Act. *Malczyk*, 85 Luz. Reg. Rep. at 210.

68. *Malczyk*, 85 Luz. Reg. Rep. at 210-11. Rule 27(a)(2) provides in part that the court shall "[p]rohibit the mechanical recording of the proceedings by anyone for any purpose." PA. R. CRIM. P. 27(a)(2). Rule 328 prohibits the taking of photographs

boards enjoy a kind of "judicial" immunity.⁶⁹ Noting what it called the "dual role" of zoning boards ("partly legislative and quasi-judicial"), the court held that the Act expressly permits the videotaping of zoning board proceedings.⁷⁰

While flirting with the dangerous, but perhaps overdue notion that deliberations of a zoning hearing board may not necessarily be covered by the Sunshine Act, the court distinguished open hearings from deliberations.⁷¹ In any event, the practice of videotaping has been occurring with increasing frequency throughout the Commonwealth, and the only thing for certain is that board members will be treated to frequent instant replays unless and until Pennsylvania appellate courts speak.

B. Immunity from Tort Liability—Delate v. Kolle

In *Delate v. Kolle*,⁷² the plaintiff, Thomas Delate, an attorney acting pro se, sought damages for personal injuries from the Zoning Hearing Board of Lower Makefield Township (the "Board").⁷³ Delate alleged that the Board engaged in willful misconduct when it granted a special exception allowing the Congregation Beth-El (the "Congregation") to build a synagogue.⁷⁴ The Board's decision to grant the exception was affirmed by the trial court, but was reversed by the commonwealth court on appeal by objecting neighbors.⁷⁵

Delate claimed that Board members accepted "fallacious" evidence, based their decision on that "fallacious" evidence, deliberately refused to apply provisions of the zoning ordinance, and used "obfuscation" in granting the variance.⁷⁶ Delate claimed that because of the Board members' actions, he was required to spend hours and weeks of time preparing for the hearings and their appeals, and was therefore entitled to damages in tort.⁷⁷

or radio or television broadcasting from a courtroom or its environs. PA. R. CRIM. P. 328.

69. *Malczyk*, 86 Luz. Reg. Rep. at 210 (citing *Urbano v. Meneses*, 431 A.2d 308 (Pa. Super. Ct. 1981)).

70. *Id.* at 210-11.

71. *Id.* at 211 (stating that "it may very well be that the *deliberations* of the Board members in reaching a decision on a particular case are not necessarily covered by the Sunshine Act.").

72. 667 A.2d 1218 (Pa. Commw. Ct. 1995).

73. *Delate*, 667 A.2d at 1219.

74. *Id.* The Congregation acquired a variance for acreage and parking requirements. *Id.*

75. *Id.*

76. *Id.* at 1219-20.

77. *Id.* at 1220. Delate stated that he spent an excessive amount of time do-

The Board raised the defense of governmental immunity under the Judicial Code.⁷⁸ *Delate*, however, contended that the Board acted with "willful misconduct" that would place the Board members within the exception to governmental immunity.⁷⁹

The trial court entered summary judgment on behalf of the Board members and the commonwealth court affirmed, stating that the Board's legal error, without more, would not support a finding of willful misconduct.⁸⁰ The court cited *Urbano v. Meneses*⁸¹ for the proposition that zoning hearing board members enjoy quasi-judicial immunity and that board members, as well as members of the commonwealth court, would be subject to suit whenever their decisions were overturned by a higher tribunal, if the instant case was decided otherwise.⁸²

C. Political Hat or Judicial Robes?

Within the space of a few short months, zoning board members had their status elevated by the commonwealth court to a level on par with that of courts, only to then face the cold reality that in the eyes of many they are still politicians to be closely watched. Whether this ambiguity is born of cynicism or of the increasingly difficult role of zoning board members has not been comprehensively revisited. It may be time to follow the lead of the commonwealth court in *Delate*.

Ironically, "sunshine" frequently does not promote justice in land use proceedings. Parties to local zoning hearings now bring what is often unprecedented public pressure to bear on board members, creating situations in which arriving at a just result is far more difficult and less tempting than succumbing to the will

ing "research, analysis, drafting, typing, traveling, taking depositions, appearing in court to appeal their decisions and orders, and performing other tasks." *Id.*

78. *Delate*, 667 A.2d at 1220. See 42 PA. CONS. STAT. §§ 8541-8559 (1982).

79. *Delate*, 667 A.2d at 1220. Section 8550 of the Judicial Code states:

In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct, the provisions of sections 8545 (relating to official liability generally), 8546 (relating to defense of official immunity), 8548 (relating to indemnity) and 8549 (relating to limitations on damages) shall not apply.

42 PA. CON. STAT. § 8550.

80. *Delate*, 667 A.2d at 1220-21 (stating that "the mere failure to reach the correct legal conclusion in a zoning case does not constitute the type of purposeful misconduct which is necessary for a finding of willful misconduct.").

81. 431 A.2d 308 (Pa. Super. Ct. 1981).

82. *Delate*, 667 A.2d at 1221.

of the crowd. Justice may be more readily attainable if, at the very least, zoning boards are permitted to deliberate in private, away from what is frequently the madding crowd. While this runs contrary to the 1990's neo-empowerment of the people, the natural extension of *Delate* may get us closer to a deliberate and effective process in which zoning boards are free to make decisions based on the facts of each case.

IV. HAVEN'T WE MET BEFORE? CELLULAR PHONE ANTENNAS, GROUP HOMES, AND AN INVITATION TO PRE-EMPTION

As you speed between suburban zoning boards on a cold and lonely night, your cellular phone provides a comfortable connection to hearth and home—comfortable until your goodnight call to the kids is repeatedly dropped because of spotty antenna coverage. While you may be frustrated by the inconvenience, poor coverage can result in far more serious consequences because security is now the principal reason for buying a cell phone.⁸³ The headlines credit cell phone users with the successful deliveries of babies in blizzards⁸⁴ and the foiling of bank robbers.⁸⁵ Bystanders with cell phones have reported exploding tanker trucks, drunk drivers and stalkers to police.⁸⁶

Headlines have also told the other side of the story; the side that explains why some emergency cell calls do not get through and why your kids sometimes go to bed without your gentle words. "Planners Reject Cell Tower Near Homes,"⁸⁷ "Cell Tower up in the Air,"⁸⁸ and "Ruckus Raised over Cell Towers,"⁸⁹ are typical newspaper responses to antenna applications.

Even the White House has encouraged the implementation of these new technologies and the economic development they will bring by facilitating access to federal property for the siting of mobile services antennas.⁹⁰ President Clinton has directed all

83. Katie Hafner, *Not Just for Big Shots*, NEWSWEEK, April 3, 1995, at 50.

84. See Lisa Gerrard, *Burr—Winter Storm Welcomes I-95 Baby*, POTOMAC NEWS, March 3, 1994, at A1.

85. Rick Rothacker, *Mobile Callers are Becoming Eyes, Ears of Law*, PHILADELPHIA INQUIRER, Jan. 28, 1996, at B1.

86. Chana Schoenberger, *The Pocket-Size Protector: Feeling Safe, Not Stylish, With Cellular Phones*, WASH. POST, Aug. 29, 1995, at B5.

87. Catherine Bridge, *El Dorado County Planners Reject Cell Tower Near Homes*, SACRAMENTO BEE, Dec. 3, 1995, at N7.

88. Carrie M. Shanny, *Cell Tower Up In the Air*, PITTSBURGH POST-GAZETTE, Nov. 26, 1995, at NW3.

89. Karen Hayes, *Ruckus Raised Over Towers Structures Fought in Pair of Towns*, BOSTON GLOBE, Nov. 19, 1995, at SW1.

90. Memorandum: *Facilitating Access to Federal Property for the Siting of Mobile Services Antennas*, Aug. 10, 1995, available in WESTLAW, 1995 WL 476250 [here-

managers of federal property to develop clear and simple procedures to assure "the efficient and rapid buildout of the national wireless communications infrastructure."⁹¹

Obviously, wireless communications and the necessary antennas have become important for economic, technological and public safety purposes. In spite of this, every small town and village has the power to blockade the on-ramps to the information highway through local zoning. Cell phone towers have become the group homes of the 1990's and in different times would have created an open invitation to the same type of legislative and court-created pre-emption that has saved disabled citizens from "Not in my backyard" attitudes.

The Fair Housing Act⁹² prohibits housing discrimination against the physically and mentally disabled.⁹³ In *City of Edmonds v. Oxford House, Inc.*,⁹⁴ the United States Supreme Court held that the Fair Housing Act provides that single-family zoning definitions cannot be used to exclude persons with disabilities.⁹⁵ On the day of the Court's decision, City of Edmonds attorney W. Scott Snyder remarked: "The effect of the ruling will be that most communities will simply get out of the business of trying to regulate group homes in any way."⁹⁶

In Pennsylvania, cell phone companies were similarly encouraged by the commonwealth court's 1992 decision in *Hawk v. Zoning Hearing Board*.⁹⁷ The court ruled that cell phone towers could be treated as public utilities for zoning purposes without being considered public utilities by the Public Utilities Commission.⁹⁸ This is important because most zoning codes have a category or exemption for public utilities or essential services. It was expected that cell phone towers would find a suitable home in every municipality as a result of *Hawk*, but as group home owners found previously, it was not that simple.

Two Allegheny County Common Pleas Court decisions put these types of applications back at the mercy of local regulators and disgruntled neighbors. In *Bell Atlantic Mobile Systems, Inc.*

inafter *Memorandum*].

91. *Memorandum*, *supra* note 91.

92. 42 U.S.C. §§ 3601-3631 (1988).

93. *Id.* §§ 3604-3606.

94. 115 S. Ct. 1776 (1995).

95. *Edmonds*, 115 S. Ct. at 1782.

96. Joan Biskupic, *Court Acts in Housing Bias Dispute: Zoning Can't Be Used to Exclude Group Homes for Disabled*, *Justices Say*, WASH. POST, May 16, 1995, at A3.

97. 618 A.2d 1087 (Pa. Commw. Ct. 1992), *allocatur denied*, 629 A.2d 1385 (Pa. 1993).

98. *Hawk*, 618 A.2d at 1090.

v. Borough of Baldwin,⁹⁹ and *Bell Atlantic Mobile Systems, Inc. v. Zoning Hearing Board* ("Bell Atlantic II"),¹⁰⁰ the court determined that, in spite of *Hawk*, local ordinances may contain public utility or essential services definitions that are not drafted broadly enough to include cell phone towers.¹⁰¹ This provides municipalities with an incentive to tighten their definitions in order to exclude "mobile domestic cellular radio telecommunications service," just as the Public Utilities Commission has done.¹⁰²

In *Crown Communications v. Zoning Hearing Board*,¹⁰³ the court determined that the zoning definition was broad enough to include a cell phone tower.¹⁰⁴ The issue of whether Crown constituted a public utility was disposed of with a holding that a lessor to public service corporations is sufficiently close to the ordinance definition to qualify as a permitted use.¹⁰⁵

In *Bell Atlantic Mobile Systems, Inc. v. Zoning Hearing Board* ("Bell Atlantic III"),¹⁰⁶ the court permitted a tower as a special exception, applying the *Bray v. Zoning Board of Adjustment*¹⁰⁷ traditional test.¹⁰⁸

As the ordinance by ordinance analysis continues, municipalities will tighten their zoning definitions, the industry will prepare for a wave of exclusionary zoning challenges, practitioners will gird themselves for *Hawk* redux and scholars will await federal pre-emption and the definitive ruling at *la Oxford House*.

V. EXCLUSIONARY ZONING—THE SIGNS OF THE TIMES

Thanks to the Validity Challenge with Curative Amendment provisions of the MPC¹⁰⁹ and numerous decisions of the commonwealth court, lawyers who spent hours poring over local zoning codes in search of an obscure constitutional infirmity were often richly rewarded with site-specific relief. It could be

99. 143 Pittsburgh Leg. J. 477 (C.P. Allegh. Cty. 1995).

100. 143 Pittsburgh Leg. J. 580 (C.P. Allegh. Cty. 1995).

101. *Baldwin*, 143 Pittsburgh Leg. J. at 478; *Bell Atlantic II*, 143 Pittsburgh Leg. J. at 582.

102. See 66 PA. CONS. STAT. § 102 (1979 & Supp. 1995).

103. S.A. 4159-94 (C.P. Allegh. Cty. 1995).

104. *Crown*, S.A. 4159-94, at 4-5.

105. *Id.* at 5.

106. S.A. 952-95 (C.P. Allegh. Cty. 1996).

107. 410 A.2d 909 (Pa. Commw. Ct. 1980).

108. *Bell Atlantic III*, S.A. 952-95, at 3-6.

109. See PA. STAT. ANN. tit. 53, § 10609.1 (Supp. 1995) (outlining the procedure for landowner curative amendments).

an unwanted pizza shop,¹¹⁰ multiple family dwellings,¹¹¹ or a billboard¹¹² that had fallen into the Locally Unwanted Land Use ("LULU") category. Applicants, however, were entitled to almost all that they requested once it was determined that a local ordinance made no room for a legitimate business use in the targeted municipality.

Zoning ordinances continue to enjoy a presumption of validity and challengers face a heavy burden when trying to show unconstitutionality.¹¹³ However, once it has been demonstrated that an exclusion is not justified by health, safety and welfare concerns of the municipality, the challenger has been entitled to site-specific relief.¹¹⁴ If municipalities were permitted to zone around challengers after a constitutional infirmity is discovered, thus denying the challenger meaningful relief, there would be no incentive to expend the time and expense necessary to have a zoning ordinance declared unconstitutional.¹¹⁵ As Justice Nix stated in a concurring opinion in *Fernley*: "[T]he township or municipality must ultimately adopt the underlying development plan. Not only does such policy guard against any possible retaliation against the litigant who opposed the zoning board, but it also serves to deter the passage of unconstitutional zoning ordinances."¹¹⁶ While the vibrancy provided by the MPC and case law has not been unbridled, the Pennsylvania Supreme Court has stated that an applicant who has successfully identified a constitutional infirmity in a zoning ordinance "should not be frustrated in his quest for relief by a retributory township."¹¹⁷

Site specific relief has been subject to reasonable regulations and restrictions, including the zoning and building code requirements necessary to protect the health, safety and welfare of the public.¹¹⁸ But these restrictions have been limited to regulations "generally applicable to the class of use or construction" of the development for which approval is being sought.¹¹⁹

110. See *Lamanti's Pizza v. Edgewood*, 556 A.2d 22 (Pa. Commw. Ct. 1989).

111. See *Fernley v. Board of Supervisors*, 502 A.2d 585 (Pa. 1985).

112. See *Borough of Dickson City v. Patrick Outdoor Media*, 496 A.2d 427 (Pa. Commw. Ct. 1985).

113. See, e.g., *In re Miller*, 444 A.2d 786 (Pa. Commw. Ct. 1982).

114. See, e.g., *Casey v. Zoning Board*, 328 A.2d 464, 469 (Pa. 1974); see also *Fernley*, 502 A.2d at 591 (listing factors that must be shown in order for a municipality to appropriately deny adoption of the proposed development plan).

115. See, e.g., *Casey*, 328 A.2d at 468.

116. *Fernley*, 502 A.2d at 592 (Nix, C.J., concurring).

117. *Casey*, 328 A.2d at 468.

118. *Ellick v. Board of Supervisors*, 333 A.2d 239 (Pa. Commw. Ct. 1975). See also *Fernley*, 502 A.2d at 591.

119. *Fernley*, 502 A.2d at 585.

In spite of this history of pro-challenger rulings, a recent commonwealth court decision in a suburban billboard case may give municipalities some cause for hope. After *J.B. Steven, Inc. v. Board of Commissioners*,¹²⁰ applicants may decide to think twice before engaging in the costly and time consuming validity challenge process. Steven successfully challenged a township zoning ordinance as exclusionary to billboards but the controversy continued in the court because of a dispute over the nature of the site-specific relief to which it was entitled.¹²¹ Specifically, the parties continued to disagree about the size and height of the billboard that would be permitted as a result of Stevens' successful challenge.¹²²

The Township ordinance included dimensional restrictions that are typical for on-site business signage and insisted that Steven limit its off-site billboard accordingly. Steven insisted that it was entitled to have larger signs consistent with what it described as the industry standard.¹²³ The stage was set. Would Steven's successful constitutional challenge go unrewarded? Would the Township be permitted to root around in its zoning ordinance to find yet another way to frustrate the challenger? Would meaningful victory now elude those applicants who strive valiantly to bring constitutional relevance to the local land use schemes of Pennsylvania municipalities? The answer, while a seemingly subtle shift on its face, may be just enough to discourage costly challenges by those applicants who encounter an exclusionary zoning code.

Embracing the Allegheny County Court of Common Pleas decision that upheld the Township's position, the commonwealth court adopted the language and findings of the court below at some critical junctures.¹²⁴ Specifically, the court stated that regulations applicable to freestanding vertical signs generally should also apply to off-site billboards.¹²⁵ Furthermore, the court stated that "the right of the developer to site specific relief is not so great as to justify penalizing the municipality by eliminating all restraints on the proposed development."¹²⁶ Finally, the court found that the business sign regulations found elsewhere in the zoning ordinance did not impose any unreasonable

120. 654 A.2d 135 (Pa. Commw. Ct. 1995), .

121. *J.B. Steven*, 654 A.2d at 136-37.

122. *Id.*

123. *Id.* at 138-39.

124. *Id.*

125. *Id.* at 137-38.

126. *J.B. Steven*, 654 A.2d at 137-38 (citations omitted).

or burdensome restraints on Steven.¹²⁷

Even a footnote by the Honorable Samuel L. Rogers in a previous commonwealth court opinion dealing with a mandamus action in this matter could not carry the day for those champions of constitutional integrity.¹²⁸ On the specific issue of applying the business sign restrictions of the code to the billboard proposal after the ordinance was found to be exclusionary, Judge Rogers stated that the on-site advertising sign restrictions could not be enforced against Steven because "these on-site sign provisions are not general zoning restrictions."¹²⁹

In the zoning appeal, Judge Bernard L. McGinley agreed with Judge Rogers on this point, but allowed the application of the on-site restrictions anyway because the Township "did more than simply engraft the restrictions."¹³⁰ He went on to state that "[t]he Board has proposed a curative amendment. If this proposed curative amendment is adopted these restrictions will apply to off-site billboards."¹³¹ The impact of this on the future of validity challenges is unknown. As applicants' lawyers search for exclusionary zoning codes that could open doors for unpopular uses, municipal solicitors may find some small comfort in what could be an early sign of a shift back in the direction of municipal governments.

CONCLUSION

Viewed individually, these recent developments in land use law are fascinating only to practitioners, planners and land use administrators. When viewed together against the backdrop of our political times, however, they tell a story that goes beyond the Republican Revolution. In fact, it may be that local government is the only level of government that is still relevant to the general citizenry. Local government provides basic services—snow removal, garbage collection, public safety, and land use regulation. It appears that some degree of control of these purely local services is being returned to the local level. The satisfaction and trust of those being served is not guaranteed. While citizens armed with video cameras roam the halls of government, no single political party will benefit for long, and the future of government may be determined on the battlefields of

127. *Id.* at 138.

128. *Id.* at 138 n.2 (citing *J.B. Steven, Inc. v. Board of Comm'rs*, 643 A.2d 142, 146 n.4 (Pa. Commw. Ct.), *allocatur denied*, 652 A.2d 841 (Pa. 1994)).

129. *J.B. Steven*, 643 A.2d at 146 n.4.

130. *J.B. Steven*, 654 A.2d at 138 n.2.

131. *Id.*

town councils, zoning boards and planning commissions.

For all its talk about "restoring bonds of trust between the people and their elected representatives,"¹³² does the Contract with America go far enough? Are the advocates of the contract prepared to go where this conservative swing of the pendulum takes them? Is local government ready for the new found power, and scrutiny, that will surely accompany this return of power to the people?

132. Contract with America, *supra* note 1, at A20.